

Khy (Migration) [2021] AATA 2557 (18 May 2021)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Say Khy

CASE NUMBER: 1732090

HOME AFFAIRS REFERENCE(S): BCC2016/194956

MEMBER: David Crawshay

DATE: 18 May 2021

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 18 May 2021 at 10:49am

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – marriage certificate not valid – allegation received – applicant and sponsor are not living together – relationship is not genuine and continuing – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5F, 65, 359, 375A

Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 14 January 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because he did not meet the definition of spouse under s.5F of the Act. Specifically, the delegate found that there was insufficient evidence to demonstrate that the applicant was the spouse of the sponsor.
4. The applicant appeared before the Tribunal on 5 March 2020 to give evidence and present arguments (initial hearing). It became necessary to conduct another hearing (resumed hearing), which was held on 22 June 2020. At the resumed hearing, which was conducted using Microsoft Teams video (MS Teams), the Tribunal heard from the applicant, the sponsor and two witnesses – Ms Chann Chea, the sponsor's sister, and Ms Thy Horm, a colleague of the applicant. The Tribunal hearings were conducted with the assistance of interpreters in the Khmer and English languages.
5. The Tribunal determined it was reasonable to hold the resumed hearing by MS Teams, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by MS Teams or other remote method. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
6. The applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

EVIDENCE AT THE INITIAL HEARING

8. The applicant told the Tribunal at the initial hearing that he and the sponsor live at an address in Darren Road, Springvale South (the Darren Road address) with his mother-in-law, father-in-law and his older brother-in-law, Chuck Chea. He said that, prior to moving to the Darren Road address about two years ago, the parties lived in Keysborough with his parents-in-law, one of his sisters-in-law, Chann Chea and the aforementioned Chuck Chea. Chann Chea was previously married to the applicant's brother, Kosal Khy, and the couple had two children. The applicant claims Chann Chea and Kosal Khy were initially living at the Keysborough address before Chann Chea moved to a new place. When the Tribunal asked whether Kosal Khy also moved with her, the applicant said that they had split up by this point, having separated after one year of the applicant being in Australia.
9. The applicant told the Tribunal that the parties met for the first time in Cambodia in July 2007 when the sponsor was over there with her parents and Chann Chea. The applicant claims that the sponsor's family came to visit his family's house. He said that the two families knew

each other because his brother married the sponsor's sister. When asked when the wedding happened, the applicant said that he did not know as it was a long time ago, although he guessed that it was around 2006. He said that he attended that wedding which was held at his house, but the sponsor did not attend. He said that the 2007 visit was not for any special occasion, and that it was for a holiday and that the sponsor and her family stayed for one night at his family's place. The applicant said that he did not think the parties spoke to each other during that visit. He said that they did not exchange contact details at that time.

10. The applicant said that the parties first spoke to each other around the time when his brother and sister-in-law came to visit him in 2014. He said that he spoke to the sponsor via Facebook Messenger and Skype. He said that he added the sponsor on Facebook in order to use Facebook Messenger. He said that, at the time, the parties wanted to be friends. The applicant said that the parties had normal conversations "like friends". He said that they liked talking to each other because the conversation flowed. He said that the sponsor speaks Khmer very well.
11. The applicant said that the sponsor came over to Cambodia on 24 September 2014 to visit with Chan Chea. He said that the sponsor visited his house and he took her to places nearby in the province. He said that, around a week later on 30 September 2014, he confessed his love to her and that he then went to tell elders on each side. When asked whether this was the proposal or if something else need to take place, the applicant said that he asked the sponsor on 30 September 2014. When asked when the parties considered themselves fiancé and fiancée, he replied that they got engaged on 9 October 2014. He said that the parties had a ring ceremony involving older guests, neighbours and parents on both sides. When questioned about whether both sets of parents attended, he corrected himself and said that his parents attended along with the sponsor's older sister.
12. The applicant said that the sponsor returned to Australia on 15 October 2014, and the parties communicated almost every day from then on. The Tribunal asked him whether he was doing any work at that stage, and he replied that at that time he was involved in baking. He said that he had a small business selling baked goods at the market. He said that he earned enough for himself.
13. The Tribunal asked if the applicant thought about getting married in Cambodia, to which he replied that the parties had not thought of it. When asked why not, he replied that the reason was he wanted to come to Australia first and then get married. When asked why he could not get married and then come to Australia, he said that he wanted to come to Australia to meet with everyone and then get married. The Tribunal asked the applicant when he arrived in Australia, and he replied 6 December 2015. The Tribunal asked the applicant when he married the sponsor, and he said 12 December 2015. The Tribunal asked whether that period of time allowed enough time to meet everyone, and he replied that it did.
14. The applicant said that the next time he saw the sponsor was in Cambodia in November 2015, just before he came out to Australia. When asked the purpose of the visit, he said that the sponsor came to visit him and to take part in an interview for his prospective marriage visa.
15. The Tribunal asked the applicant who was invited to the wedding, and he replied that the sponsor's parents, older brother and older sister attended, along with his older brother. He said that some cousins also attended. The Tribunal asked who the witnesses were. The applicant said that he did not know as the parties had gone off to get photographs taken.
16. The applicant was asked if the parties celebrated anything after their ceremony, and the applicant said that they had a small celebration at home, involving a lamb on the barbecue and other food. The Tribunal asked who attended the celebration, and he replied that the

sponsor's parents attended as well as her older brother and sister. He said that his older sisters also attended along with his older brother. The Tribunal asked whether any of her other siblings attended, and he said that he did not think so. He said that sometimes he does not remember all of the details as it was a long time ago.

17. The Tribunal turned to the matters under r.1.15A, beginning with the financial aspects of the relationship. The applicant said that the parties do not own any real estate. He said that the parties have a car under his name because he has a licence. He said that the parties have no joint liabilities. In relation to the extent of any pooling of financial resources, the applicant told the Tribunal that the parties have a joint bank account, which has two cards attached to it. He said that the parties both have individual accounts that have around \$200 each, although he had never checked her account. At this point, the applicant was asked where the sponsor works, and he replied that she helps her cousin at a fish and chips shop near the M11 Mornington Peninsula Freeway on Thursdays and Fridays, while at other times helping with the housework. He was asked how the sponsor gets to work and back home again, to which he replied that her cousin comes to pick her up and he picks her up at around 5pm both nights. The applicant was asked what the sponsor studied in the past and he said that she completed year 12. He was asked what study he had done and replied that he had also completed year 12 in Cambodia.
18. Turning to the question of whether one person in the relationship owes legal obligations in respect of the other, the applicant said that he had made a superannuation nomination in favour of the sponsor in around February 2020 or before. He then said that he did not remember the date, but thought it was in 2020. In relation to the basis of any sharing of day-to-day household expenses, the applicant said that the parties have around \$400 to \$500 worth of expenses, being \$200 for food and \$300 for all other expenses. This money goes straight to his mother-in-law. He said that the money the sponsor gets from her job goes towards general items and is kept in cash. He said that discretionary spending comes from the joint account. The applicant was asked if the parties had any other sources of income, and he replied no.
19. The Tribunal then asked for submissions on the nature of the household. The applicant confirmed that the parties do not have any children. When asked to comment on the parties' living arrangements, the applicant replied that the parties live together in harmony, they understand each other, they discuss issues, when he is not happy the sponsor supports him and lifts him up to keep going, and they have future plans. Dealing lastly with the sharing of housework, the applicant said that the parties help each other. He said that the parties undertake the housework in their spare time. Because the sponsor has more spare time, she does more of the housework than the applicant. When asked whether there were any tasks reserved for one or other of the parties, the applicant said that the parties normally help each other.
20. The Tribunal went on to question the applicant on the social aspects of the relationship. When dealing with the question of whether the parties represent themselves to other people as being married to each other, the Tribunal made the observation that a lot of the photographs come from the parties' families and that not many come from outside of these families. The Tribunal put it to the applicant that when he goes on holidays it is with members of the family. The Tribunal noted that two of the statutory declarations (to that point) had come from the applicant's older sister, as well as a declaration from a cousin of the applicant and an aunt of the sponsor. It noted that there was one declaration from someone whom the applicant identified as a work friend, and that this was (again, to that point) the only declaration from a person outside of the two families who stated that they knew about the parties' relationship. The applicant said that there were other witnesses – his cousin, his friends, his older sister, his aunt, the sponsor's older sister. The Tribunal made the point again that only one of those people – a friend – is outside of the parties' families.

The applicant agreed. The Tribunal remarked that a lot of the photographs submitted showed the parties either by themselves or with family. The applicant agreed.

21. The Tribunal asked the applicant what evidence there is to show other people that the parties are married to each other. He replied that he did not have anything to add. The Tribunal noted that the applicant was wearing his ring to the initial hearing, but that the parties did not seem to be wearing their rings in any of the photographs submitted. The applicant replied that he does not wear his ring to work because he does not want to damage it. He said that he only wears it on important occasions. When asked what is an "important occasion", he replied that it would include the parties' birthdays, anniversaries and Christmas. The Tribunal proceeded to show photographs depicting the parties' birthdays and Christmas and remarked that the parties did not appear to be wearing their rings. The applicant replied that those pictures showed "surprise" occasions where the parties did not plan ahead. The Tribunal asked the applicant whether all the photographs submitted were "surprises". He said that some of them are surprises and some are normal activities with family. The applicant was asked what happens in those situations that are not surprises. The applicant replied that the parties both knew in advance about a birthday they celebrated together with the sponsor's parents-in-law. The applicant said that the sponsor does not wear her ring because she does housework and does not want to damage it. He said that her ring is round with a raised gem. He said that it is an engagement ring, and that she does not have a separate wedding ring.
22. The Tribunal showed the applicant photographs of the parties at the Melbourne Star (refer Tribunal folios 61 and 62). The Tribunal remarked that the occasion depicted in the photograph looked formal. It noted that there was no ring on the sponsor's hand in the first photograph of folio 61 and no ring on his hand in the sixth photograph of folio 62. The Tribunal told the applicant that it looks like the photographs have not been reversed (as sometimes occurs when taking "selfies", for instance). The applicant said that the two photographs were from the same occasion – when the parties went to the Melbourne Star. The applicant was asked why the parties did not wear their rings. He replied that the parties tend to put in a "deep" place. He said that when he goes to work on a daily basis, he does not take the ring on-and-off. He said that, because it is in a safe place it can be difficult to quickly access it to put on and off. The Tribunal made the comment that there are occasions where the parties are out at functions and it cannot see the rings anywhere except for the photographs taken on the parties' wedding day. The applicant replied that the parties know and are committed to each other. He repeated that the parties keep their rings in a safe place and sometimes forget to get them and wear them.
23. The Tribunal dealt next with the opinion of the parties' friends and acquaintances about the nature of the relationship. It reiterated the fact that (up to that point) only one declaration had been made by someone outside of the two families, and asked the applicant what other evidence there was that others regard the parties as being married to each other. The applicant replied that he did not have any further evidence except that the parties go to birthdays, weddings and music concerts together which are in public. The Tribunal said that it had seen evidence of this. The Tribunal put it to the applicant that there are many things that can be done if the parties are boyfriend and girlfriend, and asked him what takes the relationship from being regarded by friends as being that of boyfriend/girlfriend to being regarded by those friends as being a married relationship. The applicant replied that the parties give each other support, raise each other when they are down and have a detailed plan about the future. He said that the parties love each other and want the proper right to be together. He said that the parties find it stressful, it is not smooth, and the sponsor is extremely worried. He said that he wants to find a better job – because of his visa he is not accepted into some jobs – and one that pays more money so that the parties can start saving for a house and have a family and live together.

24. The Tribunal asked the applicant about evidence of any basis on which the parties plan and undertake joint social activities. The applicant replied that the parties go to events together – birthdays, weddings, concerts involving Cambodian singers and holidays.
25. The Tribunal took the applicant next to the nature of the parties' commitment to each other, and firstly asked him to comment on the duration of the relationship. The applicant told the Tribunal that the parties have discussed and understood each other, they have a future plan, and have no intentions of breaking up. The Tribunal asked the applicant to explain why the parties met in the first place. The applicant said that it was because the sponsor's family came to Cambodia to visit his house. The Tribunal asked the reason why the sponsor's family visited his house, and the applicant replied that the elders from both families wanted to get to know each other more. He said that, at the time, his older brother Kosal Khy and the sponsor's older sister, Chann Chea, had already married and their parents wanted to visit each other. He said that Kosal Khy had not yet come to Australia and Chann Chea was coming to visit him. The applicant then clarified that he meant to say that his older brother and the sponsor's older sister had not yet married but were engaged. He said that this was a small error due to the ceremonies being similar to each other.
26. The Tribunal then asked the applicant to comment on the length of time during which the parties had lived together. The applicant said that the parties had lived together for four or so years. He said that they shared a bedroom at their current address. When asked to describe the bedroom, he said that there is a bed with six pillows, a wardrobe for clothes, two small tables and a television. He said that there was not an en suite bathroom. He said that the sponsor sleeps closer to the door and he sleeps closer to the window. He stated that the sponsor sleeps on his left-hand side (when lying down and looking up at the ceiling). He said that the parties use the same wardrobe to store their clothes and they put their clothes together. When asked to clarify "together", he said that the parties put their underwear in together. It later transpired that the applicant stated the parties' underwear are put in a separate chest on which sits the television and items such as the sponsor's make up. When asked about whether clothes are also stored in here, the applicant told the Tribunal that clothes are kept in the cupboard. When asked about allocation of hanging space, the applicant said that the parties' clothes get hung together.
27. The Tribunal then turned to the degree of companionship and emotional support the parties draw from each other. The applicant said that the sponsor helps support him emotionally and when there are problems he faces at work she tells him not to worry. He said that she tells him that it is all part of an experience, and not to lose faith or lose hope. He said that she is always there to support him when he has issues. When asked how he offers companionship and emotional support to the sponsor, the applicant said that he usually emotionally supports her when she is upset about something. He said that he knows what she likes to eat so he buys her chocolate.
28. The Tribunal turned lastly to the question of whether the parties see the relationship as a long-term one. The applicant said that he thought the relationship is long-lasting. He said that the parties discuss and understand each other, and if there are any problems they resolve them. He said they have future plans together which are the same. He said that he does not think that anything can separate the parties.
29. The Tribunal then informed the applicant of the presence of a s.375A certificate over information contained within the Department file. The Tribunal told him that the presence of the certificate means that the Tribunal must do all things necessary to ensure that documents or information is not disclosed to anyone other than to a member of the Tribunal. The Tribunal said that it considered the certificate to be valid, but sought his comment on its validity. It informed him that a redaction had been made to the certificate to maintain the confidentiality of the person giving the allegation. It informed him that it did not consider

limbs (b) and (c) of the certificate to be adverse information [limb (b) pertains to a site visit referral and limb (c) pertains to information from another government agency]. The applicant requested to see one of the folios in question relating to the site visit referral. The Tribunal said that it could not disclose that information, but reiterated that it did not consider the information in that folio to be adverse because it was information that could expose investigative methods if divulged. The Tribunal informed the applicant that, in contrast to limbs (b) and (c) of the certificate, it did consider limb (a) to include adverse information. The applicant told the Tribunal that it did not know what that information was. The Tribunal told the applicant that the legislation prevented it from disclosing the information to him. The Tribunal again sought the applicant's comment on the validity of the certificate. The applicant said that the parties were not lying, and the allegation is not what they believe. He said that the parties love each other, live together and want to take care of each other. He said that if there is anything else that comes in to be an issue, it is something the parties would be upset about.

30. The Tribunal then proceeded to put the gist of the information to the applicant in order to comply with the Tribunal's obligations under s.359AA of the Act to put adverse information to the applicant for his comment or response. The information was that the allegations given are allegations that the applicant's relationship with the sponsor was not genuine. The Tribunal told the applicant that if it relied on this information in making its decision, it may find the parties do not currently have and did not have at the time of application a commitment to a shared life as a married couple to the exclusion of all others and may find that the parties' relationship was not genuine and continuing at those points. The Tribunal told the applicant that this would mean that he does not meet the required criteria for the visa, and would mean that he is refused the visa for which he had applied. The Tribunal asked the applicant if he understood the information that was given, and he replied that he understood a little bit. The Tribunal clarified that the information is that the parties' relationship is not genuine. The applicant then told the Tribunal that he understood the information. The Tribunal asked the applicant if he understood why the information was relevant to the review process, and he replied that he did not know this would happen, but feel that it was extremely unfair to his relationship. He said that the parties' love has lasted for four years and that this is someone who is expressing their hatred and anger and he did not know why. He said that it was hard for him to accept – the parties had been through a lot and then to have this thrown at him was extremely unfair. The Tribunal again asked the applicant whether he understood why the information was relevant to the review process, reminding him that it suggests that his relationship with the sponsor was not genuine. After a brief discussion, the applicant replied that because he is here and because the Tribunal has told him this, he knows that "right now". The Tribunal accepts that the applicant understood the relevance of the information. The Tribunal told the applicant that he could request additional time to comment on or respond to the information, but the applicant chose to comment on and respond to the information on the spot.
31. The applicant said that the allegations were not true. The Tribunal then asked him if there was anyone who he thought might be providing this information. He replied that he did not know for sure who and he did not want to blame anyone. He said that he did not have any hatred or anger issues with anyone. He said that he had only been in Australia for four years and he did not know who would do such a thing. The Tribunal asked him if there was any reason why they would think that, and he said that he did not know if someone hates my wife's family or him, but he has not had any issues since coming here.
32. The Tribunal then indicated that it was to adjourn the hearing to a later date to hear the sponsor's evidence and the evidence of the two witnesses if this was requested. The applicant requested more time to respond to the allegations. The Tribunal said that the applicant had already provided an answer but noted from a practical perspective that he would have more time to respond given that the hearing was to be adjourned to a later date.

EVIDENCE AT THE RESUMED HEARING

33. At the resumed hearing, the Tribunal continued to question the applicant. The Tribunal asked the applicant how the parties were faring in light of the restrictions placed on them by the COVID-19 pandemic. The applicant said that there were difficulties, and he worried about when he goes out. He said that he is still working at the workplace. He said that the parties are not able to see members of their extended families, and they try to stay at home. He said that the sponsor is not working at the fish and chips shop, and is at home now and does housework.
34. The applicant told the Tribunal about the living arrangements – he lives in a bungalow house out the back of the Darren Road address with the sponsor, the sponsor's parents and one of the sponsor's brothers, Chuck Chea. In the main house lives the sponsor's other brother, Sovann Chea, wife and two children.
35. The Tribunal asked the applicant who Lin Ros and Phan Sum were. Both men signed declarations in favour of the parties' relationship. The applicant said that Mr Ros was a friend of the sponsor's father. He said that Mr Sum was a mutual friend whom the applicant knows through the sponsor's wife at family gatherings. The Tribunal asked whether these men were regarded as friends of the sponsor's family. He replied that they were.
36. The Tribunal asked the applicant whether his marriage to the sponsor was registered, as it could only find a decorative certificate on either the Department or Tribunal files and not one that was registered with Births, Deaths and Marriages. The applicant said that he was not sure if there was one. He said that there was only one certificate. The applicant was asked who the witnesses to the marriage were. He initially replied that there were family members in attendance but when it was pointed out to him that the term "witnesses" related to two people who were legally required to witness the ceremony, he said that he could not remember. Later on in the resumed hearing, he said that he had, in fact, remembered the names of the witnesses – the sponsor's sister, Chann Chea and his friend, Saroeuth Sok. Signatures from the certificate suggest that this may be correct.
37. The Tribunal reminded the applicant that it had put him on notice at the initial hearing of its concerns regarding the recognition of the parties' marriage by others. It reminded him that there was little evidence of recognition outside of the two families. The Tribunal noted to the applicant that he had submitted several declarations in favour of the relationship since the initial hearing, but most of these were from the applicant's work colleagues and the aforementioned Messrs Ros and Sum. It put to him that there was little recognition outside of the two families and select other people. The Tribunal asked why he could not provide declarations from the parties' friends and peers.
38. The applicant said that he could explain the situation. He said that when he arrived in Australia, he lived with his current wife's family and did not get to know people, except for family and friends who came over to the house of the sponsor's family, whom he said organised everything for them. He said that, because he lives with wife's family he is closer to them than to other people. He said that, culturally, he has to respect and follow what they want to do for them.
39. The Tribunal asked the applicant if he considered himself to be not very social, and he said that he does not like hanging with other people too much. The Tribunal asked if the sponsor was the same, and he said that she is quiet. The Tribunal asked the applicant about his wife's friends. He said that she does not have many friends. He named a friend of hers – Natalie – whom he earlier revealed was one of her cousins. The Tribunal asked about her friends from school. The applicant said that she left school quite a long time ago. The

Tribunal asked with whom the parties attended the concerts by Cambodian artists. He said that they mainly went with Chann Chea and the sponsor's parents.

40. At this point, the Tribunal stated to the applicant that it would be putting further particulars of the information the subject of the s.375A certificate to him for his comment or response. It informed him that it did so after further reflecting on the information and to give the applicant a better chance to comment or respond. It repeated that it did not consider the site visit referral and the information from the government agency to be adverse. In the case of the information from the government agency, which showed the sponsor as "single", it said that it would be giving no weight to this as the sponsor was not receiving welfare at that time.
41. It put particulars of the two allegations to the applicant along the following lines:
- One of the allegations was made by someone who has put their name to the allegation and has told the Department how they know the applicant. The allegation was made in 2016. The person claims that the applicant is in a false relationship with the sponsor in order to gain residency. The person claims that the applicant and the sponsor do not have living arrangements that indicate that they are spouses. This person claims that the applicant will live with other people once settled in long enough; and
 - The other allegation was made by an anonymous member of the community who was able to tell the Department how they knew the parties. The allegation was made before the 2016 allegation. The Tribunal has no way of knowing if the person who made this allegation is the same person who made the 2016 allegation. This person claims that the parties are in a fake relationship to obtain a visa in exchange for a significant cash sum, although the person has said that the sum of money will not be paid by the applicant but by other people.
42. It explained to the applicant that the information was relevant to the review because it suggested that the parties' relationship was not genuine. It told him that, if it were to rely on the information in making its decision, it may find that the parties do not currently have, and have never had, a commitment to a shared life as a married couple to the exclusion of all others, that the parties' relationship is currently not, and never was, genuine and continuing, and that the parties live separately and apart on a permanent basis. The Tribunal told the applicant that this would mean that he did not meet the required criteria for the grant of the visa, and the decision would be affirmed and he would be refused the visa for which he had applied. The applicant was asked if he understood what this information was and why it was relevant, and he answered yes to both questions. The Tribunal was asked by the applicant to grant some 20 minutes' additional time to comment on or respond to the information and it did grant this time. Upon returning to the resumed hearing, the applicant said that the allegation is not true. He said that the allegation has had a big effect on the parties' lives and their current living. The applicant said that he strongly rejects the allegation that he paid money to people – he said that it was not true. He said that, since he arrived here, he has worked hard to afford things by himself. He said that, after he got married, he lived together under the same roof as the sponsor, and that both families clearly know this. He said that, during the period the parties have been married, they have done a lot. He said that the relationship was not fake but was genuine. The applicant said that, because of the allegations, a big obstacle has been placed in front of the parties to prevent their future and plans – there has been no chance for him to get permanent residency, no chance to buy a house and no chance to have children.
43. The Tribunal asked the applicant if he had any idea of where these allegations would have come from. He replied that he had no idea. He said that he cannot figure out who hates him.

He said that he does not know if the person making the allegations hates his side of the family or his wife's side. He said he has no idea.

44. The Tribunal proceeded to question the sponsor. The sponsor told the Tribunal that the parties first met in 2007 when the sponsor was visiting Cambodia with her family. She said that they met at the applicant's house. She said that she did not remember if the parties spoke to each other at that visit. The sponsor said that she went to visit the applicant in 2014 with her sister and it was then that the parties fell in love. The Tribunal asked if the applicant proposed during that trip, and the sponsor said that he proposed on 30 October 2015, before saying that the year was 2014 and she got confused. The sponsor said that the applicant gave her a ring with a set of raised diamonds. The sponsor said that she again visited the applicant in 2015 in Cambodia.
45. The sponsor said that the parties have two joint bank accounts with Westpac. She said that she no longer works at the fish and chips shop.
46. The Tribunal asked the sponsor who the parties mix with socially. The sponsor said that they usually hang out with family. The Tribunal asked if the parties had any mutual friends, and the sponsor said the applicant's work friends. The Tribunal asked the sponsor about the people whose wedding the parties attended in 2019 in Gellibrand. The sponsor said that it was the wedding of the sister of the applicant's brother-in-law. The Tribunal put to the sponsor the lack of recognition of the parties' married relationship from outside of the two families. The sponsor replied that she is shy and "cocoon" herself.
47. The Tribunal asked the sponsor about her future plans, and she replied that the parties want to buy a house and start a family.
48. The Tribunal asked what the parties' living arrangements currently look like. She replied that the parties live in the same place as they did at the time of the initial hearing – i.e. the Darren Road address. She said that the parties live at the house to the rear of the property with her parents and older brother. She said that her sister, the sister's husband and their two children live in the main house. The Tribunal asked the sponsor to describe the common bedroom. She said that there was a bed, closet and drawer in the room. She said that the drawer has a television on top of it. She said that the parties keep their clothes together in the closet and drawers. When asked why the parties keep their clothes in together, the sponsor says that sometimes she wears his clothes. The Tribunal asked whether the parties keep their underpants together. She replied that they are in the drawer on the same level but are separate. The sponsor said that the applicant sleeps on her right-hand side (looking up at the ceiling). She said that she sleeps closer to the wall.
49. The sponsor was asked about the degree of companionship and emotional support the parties draw from each other. She replied that he cheers her up when she is unhappy, and said that he takes her places. She then asked to think for a while before asking the Tribunal to repeat the question. She then said that she cheers the applicant up by making him food and making him desserts. She said that the applicant likes steak. When asked by the Tribunal how she would feel if the applicant's visa were not granted, she said that she would be devastated and upset. She said that the parties' future together would not be the same. When asked whether the possibility had been discussed, she said that it has and the parties would "fight back harder". When asked what she likes about the applicant, the sponsor said it was the way he is loving and kind, and how he is soft-hearted.
50. The Tribunal proceeded to interview Thy Horm, who said that she had known the parties since 24 August 2017. She said that she had invited the parties to her housewarming in 2019. She said that she also meets them at other gatherings. She said that they interact with each other very well. She said that the applicant is sociable whereas the sponsor is shy. She

said that, because she and the applicant work together, she often hears his frustrations about not being able to have a family. She said that he has plans. She said she feels sorry for the parties.

51. The Tribunal then interviewed Chann Chea, who said that the parties' relationship was genuine. When asked why, she said that when she married the applicant's older brother, she got to know the family and saw that he was a good man. She said that she likes the applicant, and said that men from Cambodia care for their families. She told the Tribunal to not believe the allegations against the parties. She said that the parties are real husband and wife. She said that, without the visa, the situation is not secure and not stable.
52. The Tribunal heard from the applicant, who told it that if the decision is very bad, he will not be able to continue his life in Australia and will not be able to offer support to the sponsor, who relies on him financially and physically. He added to an answer given by the sponsor regarding the layout of their common bedroom by saying that the bed had been moved since the applicant gave his evidence in the initial hearing – from close to the window to close to the wall. The applicant was asked if the parties had changed their positions in the bed. He replied that they had not.

POST-HEARING ADVERSE INFORMATION LETTER

53. After the resumed hearing, the Tribunal became aware of information via publicly-sourced documents that it considered was adverse when considered alongside evidence given by the parties. By letter of 3 May 2021, the Tribunal put adverse this information to the applicant for his comment or response under a letter pursuant to s.359A of the Act. The letter relevantly provided as follows:

The particulars of the information are:

- At the hearings, you claim to be living at [the Darren Road address];
- A tax invoice dated 15 February 2019 from Harvey Norman for a microwave lists a "Pickup/Delivery Address" as "[an address in Talara Court, Cranbourne – the Talara Court address]" (refer **Annexure A**);
- Other tax invoices from Harvey Norman from that date and from 27 October 2018, including in relation to a chest freezer, list the address as "[the Darren Road address]" (refer **Annexure B** for invoice in relation to the chest freezer);
- Photographs of the chest freezer show that it appeared to be unpacked at a red-brick address that had diamond grille flywire security doors with a downpipe nearby (refer **Annexure C**);
- A search of open source documents (Google Maps) shows that the Darren Road address is a yellow-brick house and there is no evidence that it has a diamond grille flywire security door (refer **Annexure D**);
- In contrast, a search of open-source documents (Realestate.com.au) shows that the Talara Court address is a red-brick house. In the backyard courtyard leading into the house there are sliding doors with a diamond grille flywire security door, and there is a downpipe nearby – features which are similar to the photograph at Annexure C (refer **Annexure E**).

[annexures omitted]

The information suggests that you had the chest freezer delivered to the Talara Court address instead of the Darren Road address in spite of what had been written on the

invoice. No other mention has yet been made of the Talara Court address, including no reference to you or your sponsor living there.

This information is relevant to the review because it suggests either or both of the following:

- you and the sponsor do not live together at the Darren Road address but live in separate addresses – most likely you at the Talara Court address and the sponsor at the Darren Road address; and/or
- the receipts provided to the Tribunal are not a genuine reflection of your living arrangements or your ownership of assets.

In addition, the information is relevant to the review because it suggests that you lack credibility.

If the Tribunal relies on this information when making its decision, it may cause it to not be satisfied that you and the sponsor live together at the time of this decision. It may also cause the Tribunal to not be satisfied that you and the sponsor are in a genuine and continuing relationship that is marked by a commitment to a shared life as a married couple to the exclusion of all others at this time. You would therefore not meet the requirements of s.5F(2)(b), s.5F(2)(c) and s.5F(2)(d) of the definition of “spouse” in the Migration Act at the time of this decision and would not meet cl.820.221(1) of Schedule 2 to the Migration Regulations.

This would be the reason, or a part of the reason, for affirming the decision under review. This would mean that you are refused the visa for which you have applied.

[emphasis in original]

54. By letter dated 16 May 2021, the applicant responded to the Tribunal’s s.359A letter. The letter relevantly provided as follows:

The first information that I would like to clear up, is regarding [the Darren Road address] and [the Talara Court address]. I would like to confirm that my wife and I live together under the same roof at address [the Darren Road address]. My older sister, Chanthan Khy resides at [the Talara Court address].

• A tax invoice dated 15 February 2019 from Harvey Norman for a microwave lists a "Pickup/Delivery Address" as "[the Talara Court address]"

My wife and I bought this microwave as a gift for my sister (Chanthan Khy) who lives at [the Talara Court address]. While buying this item we told the sales rep that this is a gift for my sister. The sales rep asked for my sister address so I provided it to them; I thought they asked for her home address for warranty purposes. I did not fully understand the content of the receipt, as soon as I saw my sister address listed in it there, I believed this product to be the warranty of the microwave. I wish to confirm that, my wife and I have always lived together at [the Darren Road address]. Furthermore, you have told me during our face-to-face hearing which was held on 05/03/2020 that it has been confirmed that we live together under the same roof, by the officer who made the home visit to [the Darren Road address].

• Other tax invoices from Harvey Norman from that date and from 27 October 2018, including in relation to a chest freezer, list the address as "[the Darren Road address]"

In regard to the Chest Freezer, my wife and I bought the item to use at [the Darren Road address] as we wanted to replace the old one that our brother/brother in law (Sovan Chea) had for a very long time and we decided to surprise him to say thank you for letting us stay with him. We told Sovan after the product had delivered to our

house. However, Sovan said that his old one is still working perfectly so we should give it to Chanthan as she didn't have one. After listening to his idea, I called my sister telling her about Sovan's gift idea. My sister said it was very generous of us and she was happy to receive the gift but she knew of our financial situation so she offered to pay us half of the price. We went over and she greeted us with a big smile. For picture, we take it whenever we want to, no matter where we are.

•Living arrangements between my wife and I

We live together as husband and wife under the same roof and sleep in the same bed. We live together at [the Darren Road address]. I still remember during the hearing you told me that your officer who made the home visit had confirmed that we live together as husband and wife at the same address. We would like to confirm that we are still living together as per your visit.

During lockdown in August 2020, my sister (Chanthan Khy) who lives at [the Talara Court address] was prescribed to take medication for Schizophrenia and Depression. Unfortunately, for the first week or so in August, my sister was not doing well mentally as she was in a critical condition. Her Doctor advised my sister that it would be best for her health and the safety of her and her baby if she had someone to stay with her, especially at night. My sister told my siblings and me this and we came to conclusion that I should be the one to care for my sister. I told them that I would discuss with my wife first. After talking to my wife, together we agreed that this would be a safer option to ensure that Chanthan and her baby are safe.

It was great to see an improvement in my sister's mental health in the week that I was with her.

Until this day, my family and I take turns visiting my sister, Chanthan. My wife and I usually go over after dinner and we keep her company for a few hours before we come back home and sleep together under the same roof. Other days, we go to her house for lunch and help take care of her baby before we came back home. Sometimes, if her condition worsens, my wife and I will stay at her house for overnight to ensure she is okay.

• Conclusion

In conclusion, my wife and I would like to ask you to please consider the above comment. My wife and I have been in love for very long time now and we love each other more and more every day. There has not been a day where my wife and I lived separately since we got married, besides to care for my sister during strict lockdown during COVID-19. I made a promise to her that we would always stick together side by side and to be together forever. I am still honouring that promise by loving her, cherishing her, respecting her and of course, building a great and loving marriage together.

[emphasis in original]

55. Several documents were annexed to the letter, comprising:

- a letter dated 5 August 2020 from a doctor who claimed to be treating Ms Chanthan Khy in relation to the applicant being exempted from the five kilometre radius restrictions under the COVID-19 lockdown in Victoria;
- a selection of 23 uncaptioned photographs of the parties and others;
- a tax invoice dated 15 April 2021 from a jeweller for a bracelet, listing the parties as recipients;

- a tax invoice dated 12 April 2021 for items purchased from a women's clothing store, listing the sponsor at the Darren Road address;
- a covering letter, undated, from a bank addressed to the applicant at the Darren Road address;
- a registration renewal notice from VicRoads with due date of 22 May 2021 addressed to the applicant at the Darren Road address;
- a tax invoice from a mobile company dated 12 April 2021 addressed to the sponsor at the Darren Road address;
- a tax invoice from a chemist dated 17 April 2021 addressed to the sponsor at the Darren Road address; and
- an online order confirmation from a department store dated 4 May 2021 addressed to the sponsor at the Darren Road address.

56. The Tribunal has considered this evidence, including the response to its s.359A letter. After reviewing a copy of the hearing recordings, it does not accept that it informed the parties that a home visit was conducted where it was confirmed that the parties lived together under the same roof. It suspects that, where the applicant purported to hear such comments or where they were inferred, this may have been a misconception on his part springing from the Tribunal's statement, repeated on at least two occasions, that it did not consider a site visit *referral* as adverse information for the purposes of s.359AA. Indeed, there is no evidence on the Department or Tribunal files to demonstrate that the site visit took place and, in the absence of such evidence, the Tribunal has proceeded as if no site visit occurred.
57. In relation to the applicant's claim that the microwave oven was a gift for his sister, the Tribunal accepts that this may ordinarily be a plausible reason. However, it finds it implausible in this instance that the customer assistant at the store where the purchase took place would ask for the address of the applicant's sister for delivery purposes where the assistant had just been told by the applicant that it was a gift to that sister. Although this relies to a degree on the competence of the individual employee as well as the policies and procedures of the store involved, the Tribunal believes it is reasonable to conclude that the assistant would have differentiated between the address for delivery purposes and the address for warranty purposes where the two were not the same and would have made this clear to the applicant. While the Tribunal notes the applicant's explanation, it has chosen to give it very little weight for the reasons outlined.
58. The Tribunal also has significant doubts about the applicant's explanation in relation to the purchase of the chest freezer. Firstly, it questions the parties' ability to have transported the freezer from the Darren Road address to the Talara Court address – a trip of around 20 kms – given the specifications of the freezer (950mm x 560mm x 820mm)¹ and the capacity of the applicant's vehicle (which at the time was most likely a 2006 model Mazda 3 hatchback given the certificate of insurance dated 27 February 2020).
59. Furthermore, and alternatively, the Tribunal also finds it concerning that the parties are shown in the photographs unwrapping the freezer and not the applicant's sister (who is the purported recipient). In fact, the applicant's sister cannot be seen in any of the photographs of the freezer. The Tribunal considers that she would feature in the photographs if she were in fact the recipient of the freezer.

¹<https://hisense.com.au/wp-content/uploads/2015/11/HR6CF146-HR6CF206-HR6CF307.pdf>.

60. Based on the above evidence, and in spite of the explanation given by the applicant, the Tribunal is not satisfied that the parties gave the chest freezer to the applicant's sister as a gift as claimed.
61. The Tribunal has considered the applicant's claim that he lived with his sister during the Melbourne lockdown last year in order to help her and her young child. In this regard, the Tribunal accepts that he may have been living with and helping her at certain stages, and that one of these stages may have included during the Melbourne lockdown in 2020. In a related way, it accepts evidence from the doctor of the applicant's sister via a letter dated 5 August 2020 that she was suffering from mental health issues and that he was helping her. However, this evidence does not specifically explain the adverse information in relation to him appearing to reside at the Talara Court address at those earlier times in 2018 and 2019.
62. The balance of the evidence annexed to the applicant's response letter purports to be recent evidence of joint residence and the Tribunal deals with it under the relevant headings below.

CONSIDERATION OF CLAIMS AND EVIDENCE

63. The issue in the present case is whether the applicant was the spouse of the sponsor under s.5F of the Act at the time of applicant and whether he continues to be the spouse of the sponsor at the time of this decision.

Whether the parties are in a spouse or de facto relationship

64. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
65. "Spouse" is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

66. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects of the relationship

67. The Tribunal has considered evidence relating to the financial aspects of the parties' relationship, including evidence in relation to any joint ownership of real estate or other

assets, any joint liabilities, the extent of pooling of financial resources, any legal obligations owed to the other party, and any sharing of day-to-day household expenses.

68. The Tribunal finds that the parties do not own any joint real estate.
69. In relation to other joint assets, the Tribunal notes a receipt dated 13 June 2018 in relation to the purchase of a computer that lists the parties as the recipients, although it is unclear what this computer was used for and whether the purchase can be characterised as a joint purchase. The applicant has submitted other receipts from Harvey Norman in October 2018 and February 2019 for a television, microwave, table, lounge setting and chest freezer. The receipts indicate that the purchases were joint purchases although the Tribunal notes that they were all paid for in cash. It also has concerns, based on evidence it put to the applicant under a s.359A letter and his response, that these purchases were not made jointly but may have been made for the benefit of one party only (in the case of the chest freezer, for the benefit of the applicant at the Talara Court address), and are therefore not reflective of the parties having joint ownership.
70. There is no evidence that the parties have ever had any joint liabilities.
71. Based on the evidence, the Tribunal finds that the parties have a joint bank account into which the applicant deposits his salary, although it is unclear when this arrangement began. The bank statements provided were for a period from September to November 2019 and from March to May 2020 (with another partial statement from June 2019) and the Tribunal has not seen any statements from before this. Given that the applicant had been on notice of the Department's concerns regarding whether the applicant's salary was paid into the parties' joint account, the Tribunal would have expected him to provide statements from around that time (the delegate's decision was given in December 2017) to prove the veracity of his earlier statement. The Tribunal accepts that the sponsor received her salary in cash from her cousin at whose shop she used to work, although there is no evidence to show that this money was applied to joint expenses or deposited into the parties' joint account.
72. In relation to legal obligations owed from one party to the other, the Tribunal finds that the applicant nominated the sponsor as a non-lapsing beneficiary of his superannuation at or before 3 February 2020 according to the account summary statement provided by the applicant.
73. Finally, regarding the sharing of day-to-day household expenses, the Tribunal notes the parties' evidence that they contribute to the running of the sponsor's family home. It accepts based on the evidence given that the parties were listed as the contacts for electricity bills for the Darren Road address from at least September 2018 to August 2019 after which the applicant was listed as the sole contact. The Tribunal has attempted to reconcile the amounts listed on the electricity bills against amounts debited in the parties' joint account, but has been unable to do so. The parties claim to spend around \$400 to \$500 weekly on groceries, petrol and "everyday uses". The Tribunal acknowledges transactions on the bank statement made at Woolworths and 7-Eleven that appear to have been for groceries and petrol. The Tribunal acknowledges a tax invoice dated 15 April 2021 from a jeweller for a bracelet, listing the parties as recipients, but it is unclear who paid for this bracelet and therefore whether it was a joint purchase. It also notes that other receipts were provided for purchases in April and May 2021 from a clothing store, a department store and a chemist, but these were addressed to the sponsor and not to both parties and again it is unclear who paid for these and therefore whether they can be regarded as joint purchases or expenses.
74. The Tribunal has considered and weighed the evidence of the financial aspects of the parties' relationship. Based on the above evidence, it gives little weight to evidence of joint asset ownership. It does not give weight either way to the lack of evidence of joint liabilities

as the parties are young and claim to be living rent-free and do not appear to have accrued such liabilities. It gives some weight to the presence of a joint bank account. However, and in the absence of further evidence, it diminishes this weight as it has concerns about whether and to what degree this account is actually used by both parties and is not used exclusively or predominantly by one party (likely the applicant). The Tribunal gives weight to the applicant making a non-lapsing superannuation nomination, although it considers that this evidence only relates to the time of decision because, without more evidence, it appears to have been made in or around February 2020. It gives some weight to evidence to show that both parties are listed as contacts for the payment of electricity for the Darren Road address, although this weight is diminished as there is no evidence to show that the parties actually pay for this expense. Furthermore, while the Tribunal accepts that some transactions listed in the bank statement show payments being made for groceries and petrol, and while the parties are both listed on a tax invoice in relation to a piece of jewellery, there is very little other evidence apart from the parties' claims to demonstrate that they contribute to expenses associated with the household. This evidence is given little weight.

75. Based on the evidence and the findings made, the Tribunal is not satisfied that the evidence of the financial aspects of the relationship point to the parties being in a genuine and continuing relationship at the time of application or at the time of this decision.

Nature of the household

76. The Tribunal has considered evidence relating to the nature of the parties' household, including evidence in relation to any joint responsibility for the care and support of children, the parties' living arrangements and any sharing of housework.
77. The parties do not have any children-in-common. The Tribunal does not accord this evidence weight either way.
78. In relation to the parties' living arrangements, the Tribunal heard from them that they have lived together – firstly at the Keysborough address and then at the Darren Road address – from when the applicant arrived in Australia in December 2015. In support of this claim, the parties have provided numerous photographs of themselves at residential addresses, as well as correspondence addressed to one or both parties at the Keysborough and Darren Road addresses, including electricity bills, tax invoices, bank account statements and payslips. It acknowledges that the applicant nominated the Darren Road address in his tax return for FY2019/20. It accepts that some photographs taken of the parties show them at the addresses. The Tribunal gives this evidence some weight in favour of the parties living together.
79. Somewhat ironically, the Tribunal gives weight to details contained within the later allegation in 2016 that the parties lived under the same roof at that time (albeit that they did not have living arrangements that reflect a married couple). The 2016 allegation is dealt with in more detail below.
80. The Tribunal also gives weight to the substantially similar accounts given by the parties as to their claimed living arrangements, including the lay-out of their bedroom.
81. Lastly, the Tribunal notes evidence submitted recently showing both parties nominating the Darren Road address as their address for tax invoices and other retail documents, and correspondence from government and other entities. This is given some weight.
82. However, the Tribunal has also considered evidence that tends to show that the parties have been living separately and apart, at least since 2019. Tax invoices for purchases made at Harvey Norman show, among other things, a delivery address for one of the purchases as

being the Talara Court address, and further investigation by the Tribunal determined that a photograph of the parties unpacking the chest freezer was most likely taken at that address and not at the Darren Road address. As above, this was put to the applicant via a s.359A letter, to which he provided a response. However, in light of the concerns the Tribunal has over the explanation given, including some information that the Tribunal finds implausible in relation to the purported purchase of the microwave and chest freezer, it finds that the purchases are not indicative of the parties' joint living arrangements at the Darren Road address and may suggest that the applicant resides at another address which is most likely the Talara Court address. This evidence is given weight of an adverse nature by the Tribunal.

83. In relation to the sharing of housework, a handwritten statement from the sponsor dated 4 March 2020 stated that she cleans the house after the applicant leaves for work and prepares dinner for his return. The Tribunal also heard testimony from the applicant at the initial hearing to a similar effect. The Tribunal has considered the evidence but notes that it does not reveal any sharing of the housework among the parties. It is given little weight as a result.
84. The Tribunal has considered and weighed the evidence above. In light of the evidence and the findings made, it is not satisfied that they indicate the parties are currently living together, or are not living separately and apart on a permanent basis. It is not satisfied that the evidence of the parties' household shows that their relationship is genuine and continuing or that they have a commitment to a shared life as a married couple to the exclusion of all others.

Social aspects of the relationship

85. The Tribunal has considered evidence in relation to the social aspects of the parties' relationship, including evidence about whether the parties represent themselves to other people as being in a married relationship with each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake joint social activities.
86. The Tribunal notes the evidence submitted by the parties showing them in social situations and on holidays. One document, a handwritten statement which is undated but was submitted on 1 March 2020, details the many engagements the parties claim to have attended together. Based on this evidence, the Tribunal accepts that the parties plan and undertake joint social activities. However, as above, it questions the extent to which the parties represent themselves to people other than members of their own families and selected others as being in a married relationship. The holidays taken by the parties, while frequent, have been with members of their families. They have attended birthday parties of family members and yet there is very little if any evidence to show that they attended birthday parties of friends. The two weddings they claim to have attended were the sponsor's sister's wedding in February 2020 and the sister of the applicant's brother-in-law in February 2019 (a "family friend" as stated in a statement of 18 June 2020 from the parties). At hearing, the applicant told the Tribunal that he attended a concert with the sponsor, but also with members of the sponsor's family.
87. The Tribunal does not deny that family is important in the parties' lives, as well as in the wider cultural context. In that regard, it is not surprising that the parties spend much of their time with their families. However, the Tribunal would have expected the parties as a married couple to be able to point to more social interaction with people outside of their families and family friends. So far, they have provided evidence from the applicant's work colleagues – a narrow group of people – but otherwise have very little evidence. The Tribunal notes the evidence of the sponsor when she says that she is shy and "cocoon" herself. However, it

also notes that she appears to socialise easily with members of her family. It considers that the parties have been selective in who they represent themselves to and has concerns about this. Therefore, while this evidence is given weight by the Tribunal, its weight is diminished considerably.

88. The Tribunal has considered this lack of evidence in conjunction with the lack of evidence of the parties wearing their rings (the applicant's wedding ring and the sponsor's engagement ring). To be clear, the fact of the parties not wearing their rings would not, on its face, be a cause for concern. Clearly, it would be inappropriate to wear them in some jobs, such as when working at a florist or at a fish and chips store, and if the parties chose to meet each other for dinner or some other occasion straight after work, then the Tribunal believes it would be unreasonable to expect them to remember to wear the rings every time. However, the Tribunal has chosen to place adverse weight on this evidence because the evidence shows that they did not wear them at all except for at their wedding and at the hearings. The evidence shows that they did not wear them, for example, when they celebrated their birthdays, anniversaries and Christmas, despite the applicant telling the Tribunal at the initial hearing that these are "important occasions" where they would wear them. They did not wear them as well to a dinner they had at the Melbourne Star, which appeared to be a formal and intimate occasion. This evidence is given very little weight.
89. The Tribunal has considered this evidence when assessing whether the parties represent themselves as being married. It accepts that the applicant nominated the sponsor as his spouse to the ATO in his tax return for FY2019/20. This evidence is given weight. It also accepts, as above, that the parties have represented themselves to members of their families as being in a relationship, through going to parties, some weddings and other social events. It accepts that they have provided declarations and statements from members of their families, including the sponsor's parents, some family friends and some work colleagues of the applicant that attest to the genuineness of their relationship. The Tribunal gives this evidence weight. However, there is very little evidence of the parties representing themselves to a wider group of friends and acquaintances and these people recognising them as such. Furthermore, the fact of the parties choosing not to wear their rings when they attend parties and other social occasions, some described by the applicant as being "important", causes the Tribunal to be concerned as to whether the people at these occasions would regard them as being married and not in another type of relationship or just good friends.
90. The Tribunal has considered and weighed the evidence of the social aspects of the parties' relationship but is not satisfied that it points to them being in a genuine and continuing relationship at the time of application and at the time of this decision.

Nature of the parties' commitment to each other

91. The Tribunal has considered evidence about the nature of the parties' commitment to each other, including evidence pertaining to the duration of the parties' relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long-term.
92. The parties claim to have met each other in 2007 in Cambodia. The Tribunal is aware of the existing relationship between the two families and, based on this and on movement records that show the sponsor travelling outside of Australia at that time, accepts that they most likely met on that occasion. The parties claim to have committed to a shared life together to the exclusion of all others on 9 October 2014 when they became engaged in Cambodia. Based on this timeline, the parties claim to have been in a committed relationship for over six-and-a-half years at the time of this decision. This evidence is given weight.

93. The parties claim that they began living together at the house of the sponsor's family when he arrived in Australia in December 2015. As above, the Tribunal accepts that the parties may have been living under the same roof at the time of application but has concerns that they are currently living separately and apart and have been living so since February 2019 at the latest. This evidence is given positive weight at the time of application but little weight at the time of decision.
94. The Tribunal turns to the degree of companionship and emotional support that the parties draw from each other. It notes evidence given by the sponsor in a handwritten statement dated 4 March 2020 wherein she stated that she married the applicant because
- he knows the little things that cheer me up and make me happy when I'm feeling down. That he loves my family even though they are crazy loud. And that he know's [sic] me better than myself, and I can't imagine life without him.
95. In an undated statement that was submitted on 1 March 2020, the applicant stated that "[i]n the past four and a half years we have been living together very happily. We always forgive each other after an argument. We always discuss thing's [sic] first before doing anything."
96. At the initial hearing, the Tribunal heard from the applicant that the sponsor supports him emotionally, including in relation to problems at work. He said that he offers emotional support to the sponsor when she is upset about something. At the resumed hearing, the sponsor said that the applicant cheers her up when she is unhappy. She said that she would be devastated and upset if the applicant were not to be granted the visa and said that the parties' future together would not be the same. She said that the sponsor is loving, kind and soft-hearted.
97. The Tribunal has also considered the many photographs of the parties together and notes that these invariably show the parties close to each other. It has also considered birthday cards given by one party to the other.
98. The Tribunal accepts based on this and other evidence that the parties offer each other some support in their lives and this evidence is given weight. However, it also acknowledges the existing connection the parties had through the marriage of the applicant's brother to the sponsor's sister and accepts that the two families appear to be close to each other. It considers that it would be reasonable for close family friends in this situation to offer each other support, especially in the case of friends who had been living under the same roof and had been seeing each other regularly, if not every day, for a long period of time. Therefore, while the Tribunal accords some weight to this evidence, it must be considered alongside other evidence, including those pieces of evidence that the Tribunal considers adverse.
99. In this regard, the Tribunal has considered the allegation made in 2016 in relation to the applicant being in a false relationship with the sponsor in order to gain residency, the parties not having living arrangements that indicate that they are spouses, and the applicant intending to live with other people once settled in long enough. It has considered that it is an allegation made by someone who has put sufficient particulars to the allegation, including their name, to suggest that they know the parties. It has considered that the person making the allegation is in a position to be able to make this allegation. Lastly, and as above, parts of the allegation are substantiated by other evidence. For example, the allegation that the applicant intended to live with other people once settled is largely substantiated by evidence contained within the Tribunal's s.359A letter of 3 May 2021 in relation to purchases made for and photographs taken at the Talara Court address which, in the eyes of the Tribunal, shows the applicant living there and not at the Darren Road address. For these reasons, the Tribunal is inclined to give weight of an adverse nature to the 2016 allegation and its particulars – namely, that the applicant is in a false relationship with the sponsor in order to gain residency, the applicant and the sponsor do not have living arrangements that indicate

that they are spouses, and the applicant will live with other people once settled in long enough. This evidence, being the allegation given in 2016, is given weight of an adverse nature in the Tribunal's consideration of the nature of the parties' commitment to each other.²

100. Having considered this evidence, the Tribunal accepts that while the parties may offer each other some companionship and emotional support, it is not satisfied that this companionship and emotional support is given from one party in a married relationship to another, and considers it more plausible that it is given as between two close family friends.
101. Turning to the question of whether the parties view their relationship as a long-term one, the Tribunal notes evidence from the applicant in a handwritten but undated statement submitted on 1 March 2020 that the parties are planning to save up to buy a house after which they will try for children. It acknowledges similar evidence given by the sponsor at the resumed hearing. This evidence is given some weight.
102. The Tribunal acknowledges that the applicant has made a non-binding superannuation nomination in favour of the sponsor in early-2020. This evidence is also given some weight.
103. The Tribunal notes the joint bank account statements provided by the applicant and acknowledges that they appear to show that its balance is gradually growing to the point where it is a reasonably sizeable sum of money as at late-May 2020. However, and for the reasons given above in relation to the financial aspects of the parties' relationship, the Tribunal has concerns about whether and to what extent the account is operated jointly by the parties and not by the applicant despite its being a joint account. This evidence is given very little weight.
104. Finally, the Tribunal notes evidence suggesting that the parties may have been living separately and apart from each other since at least February 2019, which was the subject of its s.359A letter to the applicant. The Tribunal accords adverse weight to this evidence.
105. Having considered and weighed the above evidence, the Tribunal is not satisfied that the parties view their relationship as a long-term one.
106. The Tribunal has considered the evidence overall in relation to the nature of the parties' commitment to each other but is not satisfied that it points to the parties having a mutual commitment to a shared life as a married couple to the exclusion of all others at the time of application and at the time of decision, or to their relationship being genuine and continuing at those times. The Tribunal is not satisfied that the evidence indicates the parties are living together, or not living separately and apart on a permanent basis, at the time of decision.

CONCLUSION

107. The Tribunal acknowledges that the parties have provided it with evidence that seeks to show that they are in a married relationship, and it has given this evidence weight in its overall consideration of the question. It accepts that the parties shared the same addresses with the sponsor's family in Keysborough and then at the Darren Road addresses. It accepts that they may have socialised together among family and some family friends. However, the task of assessing the genuine and continuing nature of a relationship, and the parties' commitment to it, is a balancing exercise where evidence is weighted against itself before arriving at a decision.

²In contrast, the Tribunal gives no weight of an adverse nature to the earlier allegation. While the allegation gives specific particulars, the person making the allegation has chosen not to reveal their name. For this reason, the Tribunal is also not able to ascertain if the two allegations have been made by the same person.

108. In that regard, while the Tribunal gives some positive weight to evidence provided by the parties, it has chosen to give more weight of an adverse nature to other evidence, including the 2016 allegation the subject of a s.375A certificate and a s.359AA request at the hearings, evidence of the parties not representing themselves beyond a small group comprising family and some family friends, evidence that the parties have not worn their rings on occasions that they regarded as “important”, and evidence that casts doubt on their claim to be living together that was contained within the s.359A letter of 3 May 2021.
109. Having balanced the evidence against itself, the Tribunal is not satisfied that the parties’ relationship has ever been genuine and continuing, and it is not satisfied that the parties have ever had a commitment to a shared life as a married couple to the exclusion of all others. The Tribunal is also not satisfied that the parties live together, or do not live separately and apart on a permanent basis, at the time of this decision. The applicant therefore does not satisfy s.5F(2)(b) or s.5F(c) at the time of application, and does not satisfy s.5F(2)(b), s.5F(2)(c) or s.5F(d) at the time of decision.
110. Therefore, the applicant does not satisfy s.5F(2).
111. Because the applicant does not satisfy s.5F(2) at the time of application or at the time of decision, he does not meet cl.820.211(2)(a) or cl.820.221. There is no evidence that he satisfies any of the alternate subclauses under those clauses.
112. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

113. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

David Crawshay
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).